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PAGE

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	6
Conclusion	11

CITATIONS

Cases:

Bielicki v. *Superior Court of Los Angeles County*, 21 Cal. Rptr. 552	8
Britt v. *Superior Court of Santa Clara County*, 24 Cal. Rptr. 849	7
Elkins v. *United States*, 364 U.S. 206	10
Johnson v. *Yellow Cab Co.*, 321 U.S. 383	10
McCoy v. *Pescor*, 145 F. 2d 260, certiorari denied, 324 U.S. 868	10
Puerto Rico v. *Shell Co.*, 302 U.S. 253	10
Williams v. *United States*, 327 U.S. 711	10

Constitution and Statutes:

Assimilative Crimes Act, 18 U.S.C. 7	2
California Penal Code, Section 288a	2, 5
Constitution of the United States, Fourth Amendment	7, 10

795-054—65

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PAGE

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 730

JOSEPH L. SMAYDA AND WENDELL H. GUNTHER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. C) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1965. The petition for a writ of certiorari was filed on November 8, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court erred in admitting evidence that had been obtained by concealed observation of petitioners while they were in a public rest room.

STATEMENT

After waiving trial by jury, petitioners were convicted in the United States District Court for the Northern District of California of oral sex perversion (made punishable by the California Penal Code, Section 288a) in violation of the Assimilative Crimes Act, 18 U.S.C. 7 (I R. 1–2; II R. 177).[1] They were sentenced to imprisonment for three years—of which all but six months, however, was suspended—and to probation for five years, to begin at the expiration of the six months and to be conditioned upon their receiving psychiatric treatment (I R. 39–40).

During June and July of 1963, numerous complaints about homosexual activity in Yosemite National Park were made by tourists to the Park rangers, and to the management of the Yosemite Park and Curry Company, a privately operated government concessionaire located in the Park (II R. 38–39, 46–47, 57, 85–86, 105). All of the homosexual activity complained of by the tourists had occurred in the Camp Curry area of the Park (II R. 38–39, 85), which accommodated approximately 1,400 guests per day[2] during the sum-

[1] The record consists of two independently paginated volumes, designated "I R." and "II R.", respectively.

[2] There were approximately 35,000 to 40,000 tourists in the entire Park each day during the 1963 summer season (II R. 112).

mer season (II R. 34, 112) in tent-cabins, cabins without baths, cabins with baths, and hotel rooms (II R. 34). The complaints made by tourists included reports of actual physical assaults of a homosexual nature (II R. 105, 133), homosexual propositions (II R. 101), and at least one witnessed act of oral copulation (II R. 38–39, 46–47, 57). Most of the acts complained of involved molestation of young people (II R. 86). In addition, employees of the Curry Company complained "almost daily" (II R. 48) about homosexual activity in the Camp Curry area (II R. 48, 61), including an incident involving homosexual advances to one of the Company's hotel room clerks (II R. 61, 87).[3] Most of the homosexual activity occurred in and about public rest room No. 600 operated by the Curry Company (II R. 39–40, 46, 48, 57, 86, 97, 119–120, 131–133).[4]

In addition to the complaints, Park rangers and Curry Company employees had independently observed the congregation of individuals whom they believed to be homosexuals in the vicinity of rest room No. 600 (II R. 39–40, 48, 61, 70, 86, 119–120, 122). Such individuals wore unusual and distinctive clothing, engaged in conversations and made remarks which were of a homosexual nature (R. 131), and usually

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[3] The Park rangers determined that the individual who had addressed the hotel clerk had an extensive criminal record and had served five prison terms for various convictions of sodomy and other sexual perversions (II R. 87).

[4] Such public rest room buildings were located throughout the Park in areas where the Curry Company offered what it described as "non-bath" accommodations (II R. 34).

gathered and loitered about rest room No. 600 in the late evening when most of the other tourists had retired for the night (II R. 61, 86, 97, 119–120, 122). Unknown persons had cut holes at waist height in the wooden partitions separating the three individual toilet stalls in rest room No. 600, and had re-opened such holes after the Curry Company had closed and patched them (II R. 40, 88–89, 123).[5] In addition, holes had been cut in the wooden doors on the toilet stalls (II R. 40, 88–89, 98). Writings on the walls of other rest rooms in the Camp Curry area indicated that rest room No. 600 was a focal point of homosexual activity, and invited persons to come to rest room No. 600 to participate in such activity (II R. 40). The manager of Camp Curry had personally observed that, during the late evening hours, individuals would enter the toilet stalls and remain therein for as long as an hour at a time without using the toilets as they were intended to be used (II R. 70). Such individuals unscrewed the light bulbs in order to have absolute darkness (II R. 40).

In the light of these events, in late June or early July 1963 the manager of Camp Curry had a conference with the Park ranger who was the law enforcement specialist for the area (II R. 40–41, 95). At that conference, it was decided that undercover observation of rest room No. 600 was necessary in

[5] Stains, and the results of an ultraviolet light test, led Park rangers to surmise that such holes were being used in connection with homosexual acts (II R. 92–93). A detailed description of the rest room and its interior is contained in the opinion of the court of appeals (Pet. App. C, pp. 4–6).

order to halt the homosexual activities, and to that end the Curry Company had its carpenters cut a six-inch square observation hole in the ceiling above each of the three toilet stalls (II R. 41, 95–96). Each hole was then covered with a screen to make it look like an air vent (II R. 41).

On the night of July 13, 1963, a Saturday, a Park ranger and a photographer entered the attic of rest room No. 600 at 11:00 p.m., and observed the rest room's interior through the holes cut in the ceiling (II R. 97). Two other Park rangers were stationed a short distance from the building, and contact with them was maintained by two-way radio (II R. 97). The ranger in the attic observed several men entering the toilet stalls and using the holes in the partition walls and stall doors to watch other men using the rest room (II R. 98). Two men were observed to perform (by means of one of the holes in the partition) an indecent act (though not in violation of California Penal Code, § 288a). No arrests were made.

No further observation was conducted until the next Saturday night, July 20, 1963 (II R. 100). In the intervening period additional complaints of homosexual activity in the immediate vicinity of rest room No. 600 had been received by the rangers (II R. 101, 131).* At 11:00 p.m., the ranger and the photographer entered the attic of rest room No. 600, as before, and maintained radio contact with two other rangers sta-

*One complaint was received only one half hour before observation was begun on July 20 (II R. 101, 131).